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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. FIDEL ALCANTAR SOTO, Defendant and Appellant.	C079705 (Super. Ct. No. CRF145704)

A jury found defendant Fidel Alcantar Soto guilty of one count of committing oral copulation with a child 10 years old or younger (count 1), two counts of committing a lewd or lascivious act upon a child under age 14 (counts 2 and 3), and one count of abusing or endangering a child (count 4). The jury also found true an allegation that defendant committed the acts alleged in counts 2 and 3 against more than one victim. The trial court subsequently granted defendant's motion to dismiss count 3 and set aside the corresponding true finding as to the enhancement. On appeal, defendant contends the

trial court erred in denying his *Batson/Wheeler*[1] motion. Specifically, he asserts the trial court did not fulfill its duty in the third stage of the *Batson/Wheeler* proceeding because the prosecutor's stated reasons for striking a female African-American prospective juror were unsupported by the record or inherently implausible, thereby triggering an obligation on behalf of the trial court to make detailed findings. We disagree. Further, substantial evidence supports the trial court's finding that the prosecutor's peremptory challenge was not based on race. Accordingly, we will affirm the judgment.

I. BACKGROUND

The facts of defendant's crimes do not require further examination as they are unrelated to the resolution of this appeal.

Voir dire was conducted in multiple rounds of prospective jurors. Both sides started with 20 peremptory challenges. In the first round, 18 potential jurors were called. The next five rounds each consisted of seven individuals. In the final round, six potential alternates were called, and both sides received two additional peremptory challenges. N.G. was in the fifth of the seven groups. At this point, two jurors had been excused for cause, and the prosecution had exercised 14 peremptory challenges to the defendant's 12.

During voir dire, N.G. provided some requested biographical information: "My name is [N.G.] I'm a resident of Yolo County. I live in West Sacramento. I'm a dental assistant. I live with my mother, she's a supervisor of a recycling center. And [I have] no kids."

After her group was examined, the prosecutor excused one juror and defense counsel excused two more before the prosecutor excused N.G. Then, defendant made a *Batson/Wheeler* motion. Defense counsel explained the basis for his motion: "[N.G.] is an African American woman. Nothing she said could have reasonably led to a

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

peremptory challenge. She is working as a dental assistant, her mother is a supervisor at a recycling place. The only reasonable conclusion I have that she was struck—I don't believe there was any race-neutral reason to strike her."

The court found defense counsel made a prima facie showing, and invited the prosecutor to explain his reasons for excusing N.G.

The prosecutor explained that N.G. "seems like she has very little life experience. She seems very young. . . . [Y]oung adults are not a recognized group for purposes of *Wheeler*. I have concern about a number of jurors for that reason.

"I would also note for the record, and this is unseenly [*sic*], that she, [N.G.], is morbidly obese. Extremely obese. Generally, I have concern about people who are morbidly obese, how they might interact with other jurors, what motivates them. It's my own—it's my own thing. And the fact when I was talking to her I got the sense she wasn't fully answering the questions. And I actually asked her that, 'Is there something else you wanted to say?' And she said something like, 'Well, no. I thought I was waiting for you to get done with your questions.' "[2] (Italics added.)

The prosecutor also specifically denied exercising his challenge because N.G. was African American.

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[2] The reporter's transcript suggests this exchange was with a different potential juror:

"[PROSECUTOR]: Okay. Ms. [B.] choices versus circumstances?

"POTENTIAL JUROR: Choices.

"[PROSECUTOR]: Either side require[d to] produce the alleged victim for evidence?

"POTENTIAL JUROR: No.

"[PROSECUTOR]: Okay. You seem like you wanted to say something. Did you want to say anything?

"POTENTIAL JUROR: No. I was just waiting for you to finish."

Defense counsel began his rebuttal by "concede[ing]" that N.G. is obese and pivoting to his assertion that "[t]here's at least three or four different jurors who are younger than [N.G.]" Defense counsel also argued the prosecutor's claim that N.G. lacked life experience was "not supported by the record, at least compared to other jurors who [defense counsel] has not challenged." Defense counsel did not address the prosecution's characterization of N.G.'s responsiveness or their exchange. Defense counsel did add, "[I]f [the prosecutor] struck her because she's obese, the Court's going to have to make a decision whether that's a sufficient race-neutral reason. I confess, I do not know the case law on striking obese people, whether they're a protected class or whether there's a sufficient race-neutral reason to overcome a *Batson/Wheeler* challenge. But she's not the only overweight person on the panel. It's—it seems like a suspicious reason and I ask the Court to sustain the challenge." (Italics added.)

The trial court denied the motion: "I do not find that the evidence and arguments supports a conclusion that there has to be [*sic*] purposeful discrimination in exercising the challenge against [N.G.]"

II. DISCUSSION

Defendant contends the trial court's ruling violated his right to equal protection under the Fourteenth Amendment to the United States Constitution (*Batson, supra,* 476 U.S. at p. 89) and his right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution (*Wheeler, supra,* 22 Cal.3d at pp. 276-277). "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Silva* (2001) 25 Cal.4th 345, 386 (*Silva*).)

The law applicable to *Batson/Wheeler* claims is well-established: "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were

exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613; accord *People v. Mills* (2010) 48 Cal.4th 158, 173.)

In this case, only the third step is at issue. "At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (*People v. Lenix*, *supra,* 44 Cal.4th at p. 613, fn. omitted.)

We review the trial court's determinations for substantial evidence. (*People v. Lenix*, *supra,* 44 Cal.4th at p. 613; see also *Foster v. Chatman* (2016) __ U.S. __ [136 S.Ct. 1737, 1747, 195 L.Ed.2d 1, 13] (*Foster*) [explaining the third step "turns on factual determinations, and, 'in the absence of exceptional circumstances,' we defer to state court factual findings unless we conclude that they are clearly erroneous"].) "We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) The trial court here did not make explicit findings regarding the prosecutor's stated reasons for striking N.G. However, "[w]hen the trial court has inquired into the basis for an excusal, and a nondiscriminatory explanation has been provided, we . . . assume the court understands,

and carries out, its duty to subject the proffered reasons to sincere and reasoned analysis, taking into account all the factors that bear on their credibility." (*People v. Mai* (2013) 57 Cal.4th 986, 1049, fn. 26.) Likewise, "[w]hen the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Silva, supra*, 25 Cal.4th at p. 386.)

Defendant's assertion of error rests on his invocation of this latter principle from *Silva*, but he has not demonstrated that the prosecutor's explanation was implausible or unsupported by the record such that more detailed findings by the trial court were required. Here, the prosecutor based his decision on a totality of factors. "Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1220.) Defendant attacks each of the prosecution's stated factors individually, and we conclude his arguments neither separately nor collectively persuade.

Defendant does not dispute that N.G. was in fact young and appeared to lack life experience. Instead, he contends this was a pretextual explanation because other jurors were also young and lacked life experience. Defendant relies primarily on *Foster, supra*, 195 L.Ed.2d 1 and *Snyder v. Louisiana* (2008) 552 U.S. 472 (*Snyder*) to support this claim. With respect to *Foster*, defendant quotes from a passage in which the United States Supreme Court, after holding that several of the prosecution's stated reasons for striking a particular potential juror were contradicted by the record, observed that other explanations for striking the juror—including the juror's age—"while not explicitly contradicted by the record, are difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered [the excused panelist] an unattractive juror." (*Foster, supra*, at p. 15.) In particular, this excused African-

American juror "was 34, and the State declined to strike eight white prospective jurors under the age of 36." (*Id*. at p. 16.)[3] In *Snyder*, the United States Supreme Court found one of the prosecutor's stated explanations for why he excused a particular African-American juror, J. Brooks, pretextual for similar reasons. (*Snyder, supra,* at pp. 479-485.) The prosecutor used five of his 12 peremptory challenges to eliminate all of the African-American prospective jurors from the panel.[4] (*Id*. at pp. 475-476.) The prosecutor said he dismissed Brooks in particular because: (1) Brooks looked nervous during questioning and (2) he had expressed concern about jury service because he was a student-teacher and was missing classroom time. (*Id*. at pp. 478, 480.) The Supreme Court decided it could not presume the trial court credited the prosecutor's assertion regarding Brooks' nervousness instead of basing its ruling on the second justification. (*Id*. at p. 479.) As to the second justification, the court stated, "[t]he implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'." (*Id*. at p. 483.) In our case, the prosecutor's explanation for why he excused N.G. is neither

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[3] While the Supreme Court described the evidence that the prosecutor's proffered reasons for striking two African-Americans panelists applied just as well to similar non-African-American panelists who were permitted to serve as "compelling," this was not the only basis for its decision: "There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file. Considering all of the circumstantial evidence that 'bear[s] upon the issue of racial animosity,' we are left with the firm conviction that the strikes of [the two challenged panelists at issue] were 'motivated in substantial part by discriminatory intent.' " (*Foster, supra,* 195 L.Ed.2d at p. 1754.)

[4] Here, the record regarding the composition of the jury is limited. The prosecutor did represent that one of the potential jurors that remained on the panel at this point was an African-American woman. This would lend further support to the trial court's determination. (See *People v. Davis* (2008) 164 Cal.App.4th 305, 313-314 ["Further supporting the trial court's determination that this was not a pretext is that other African–Americans remained in the pool of prospective jurors"].)

implausible nor difficult to credit. The prosecutor admitted he had concerns about other jurors based on their youth as well. And N.G. was in one of the final groups of prospective jurors: "[T]he particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220.) And critically, unlike in *Foster* and *Snyder*, the prosecutor here relied equally on other factors that were supported by the record.

In particular, the prosecutor made the observation, which he characterized as unseemly, that N.G. was "morbidly obese." He explained he has "concern about people who are morbidly obese, how they might interact with other jurors, what motivates them. It's my own—it's my own thing." Defendant asserts this is a suspicious justification. We disagree. It is supported by the record and not inherently implausible. (See *People v. Johnson, supra*, 47 Cal.3d at p. 1218 [prosecutor explained in part that one excused juror "was overweight and poorly groomed, indicating that she might not have been in the mainstream of people's thinking"]; see also *People v. Howard* (1992) 1 Cal.4th 1132, 1208 (conc. & dis. opn. of Kennard, J.) [prosecutor's statement that juror was " 'grossly overweight, appeared unclean and wore an excess of cheap jewelry' " were "factors he believed might prevent effective interaction with other jurors" was "plausible, and there is no apparent reason why we should reject [it]"].) And while defense counsel also argued other jurors were "overweight," there is no suggestion that the fact that N.G. was "morbidly obese" coupled with her youth did not make her unique among the jurors. (See *People v. Mai, supra,* 57 Cal.4th at p. 1051 ["Nothing indicates the prosecutor was wrong in suggesting that when [the excused panelist's] age, familial status, *and death penalty views* were considered *together*, she was unique among the jurors who had been evaluated at the time the prosecutor excused her"].) In short, the record adequately

supports the prosecutor's explanation of the race-neutral reasons that collectively led him to exercise a peremptory challenge against N.G.

Defendant also notes it appears from the record the prosecutor misattributed some statements made by a different juror to N.G. But a genuine mistake—even one that goes unnoticed in the trial court—is a race-neutral reason. (*People v. Williams* (2013) 56 Cal.4th 630, 661.) Accordingly, our Supreme Court rejected a similar challenge based largely on *Silva* in *People v. Jones* (2011) 51 Cal.4th 346, 361. In that case, defendant argued on appeal that the prosecutor misstated one of the excused juror's answers while explaining the justification for a peremptory challenge. (*Id*. at p. 366.) At the trial court, defense counsel declined to comment on the prosecutor's explanations for exercising his peremptory challenges, "thus suggesting he found the prosecutor credible." (*Id*. at p. 361.) Our Supreme Court held that "[u]nder the circumstances, the court was not required to do more than what it did." (*Ibid*.) It also found no basis to overturn the trial court's ruling denying defendant's motion: "The purpose of a hearing on a *Wheeler/Batson* motion is not to test the prosecutor's memory but to determine whether the reasons given are genuine and race neutral. 'Faulty memory, clerical errors, and similar conditions that might engender a "mistake" of the type the prosecutor proffered to explain his peremptory challenge are not necessarily associated with impermissible reliance on presumed group bias.' [Citation.] This 'isolated mistake or misstatement' [citation] does not alone compel the conclusion that this reason was not sincere." (*Id*. at pp. 366, 368.) Likewise, here, the prosecutor accurately described an exchange that occurred. No one questioned the sincerity of his recollection on the record. Under these circumstances, the trial court did not abuse its discretion in declining to make more detailed findings or denying defendant's *Batson/Wheeler* motion.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

BLEASE, Acting P. J.

/S/

NICHOLSON, J.